No. 96-391

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

OLLIE DAILEY,

Petitioner,

vs.

LTV AEROSPACE AND DEFENSE COMPANY,

Respondent.

CONSOLIDATED WITH

OLLIE DAILEY,

Petitioner,

vs.

VOUGHT AIRCRAFT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals has determined that the District Court did not commit reversible error in prohibiting Petitioner from adding new or different causes of action to his already pending lawsuit?

2. Should this Court grant a writ of certiorari where the Fifth Circuit Court of Appeals determined that the District Court did not commit reversible error when it required Petitioner to assert his new claims in different actions?

3. Should this Court grant a writ of certiorari where the subsequent opinions granting summary judgment on Petitioner's new claims demonstrate that he would not have been entitled to a jury trial even if they had been added to his first action?

LIST OF PARTIES

All parties are set forth in the caption to this matter. Pursuant to Rule 29.(6), Respondent LTV Aerospace & Defense Company's parent corporation was LTV Corporation. Certain assets of LTV Aerospace & Defense Company were sold and became Respondent Vought Aircraft Company, which was owned by Northrop Grumman Corporation and the Carlysle Group. Northrop Grumman Corporation subsequently became the sole owner of Vought Aircraft Company.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT:

Vought Aircraft Company (hereinafter referred to as "Vought") files this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit asking this Court to deny the Petition for Writ of Certiorari (hereinafter referred to as "Petition") to review the opinion issued on March 13, 1996 by the United States Court of Appeals for the Fifth Circuit. In support of this request, Vought respectfully shows the Court as follows:

JURISDICTION

This Court's jurisdiction of this appeal is based on the judgment and opinion of the Fifth Circuit Court of Appeals entered on March 13, 1996. The Petitioner's suggestion for rehearing *en banc*, treated as a petition for panel rehearing as well, was denied by the Fifth Circuit on June 14, 1996. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254(1) and the Petition was timely filed within ninety days of the denial of the petition for rehearing as required by Rule 13.4, Supreme Court Rules.

STATUTES INVOLVED

This appeal involves allegations of race discrimination and retaliation in violation of Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2000e-17 ("Title VII") and 42 U.S.C. § 1981, and disability discrimination in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213.[1] The case also involves application of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The particular relevant statutory provisions are as follows:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race. . . .

42 U.S.C. § 2000e(2)(a) [Title VII].

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving

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[1] The cases also involved allegations of violation of the Rehabilitation Act, 29 U.S.C. § 793(b) and state law claims of intentional infliction of emotional distress. Those claims were dismissed by the District Court and were not appealed.

> notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(b) [Title VII].

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981.

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) [ADA].

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney

> General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12166 of this title, concerning employment.

42 U.S.C. § 12117(a)[ADA].

> If a complaining party seeks compensatory or punitive damages under this section –
>
> (1) any party may demand a trial by jury; . . .

42 U.S.C. § 1981(c)(1) [the '91 Act].

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND OPINIONS BELOW.

Petitioner's summary of the opinions is partially correct, but is at best, confusing. Therefore, in order to clarify the proceedings below and avoid any additional confusion, Vought restates the history of the case as follows:

Petitioner Ollie Dailey (hereinafter referred to as "Dailey") brought three suits against Vought and its predecessor for alleged violations of various employment related statutes over the past several years. The first, *Dailey v. LTV Aerospace & Defense Company*, No. 3:91-CV-1327-X in the District Court and Appeal No. 95-10156 before the Fifth Circuit Court of Appeals (hereinafter referred to as "*Dailey I*"), alleged Vought discriminated against Dailey in and prior to October of 1990 on account

of his race, retaliated against him because he complained of discrimination, violated the Rehabilitation Act and intentionally inflicted emotional distress upon him. Dailey also sought to recover damages pursuant to the Civil Rights Act of 1991 (hereinafter referred to as "the '91 Act"). The District Court entered the following orders in *Dailey I*:

1. Dismissal of Dailey's claims arising under the '91 Act as the alleged discriminatory conduct at issue occurred before passage of that Act;

2. Striking of Dailey's final supplemental complaint, filed without leave of court, on the basis that the discrimination claims relating to Dailey's July 1993 layoff were too remote in time to his claims relating to his failure to return to work in October of 1990, which was the main issue in the suit, and there was not yet an EEOC charge filed challenging the layoff, and denying a subsequent attempt to add these claims a few weeks before trial;

3. Summary judgment in favor of Vought on Dailey's claims for intentional infliction of emotional distress and violation of the Rehabilitation Act;

4. Dismissal of Dailey's claim under the ADA relating to his attempt to return to work in October of 1992 in order to allow completion of the administrative process, and denial of the motion to reconsider that decision;

5. Removal of the case from the jury docket on the basis that Dailey's remaining claims arose before the effective date of the '91 Act and Dailey had not made a timely attempt to amend his previous charge of race

discrimination to include his October 1992 attempt to return to work; and,

6. After trial on the merits, issuing findings of fact and conclusions of law dismissing Dailey's remaining claims of race discrimination and retaliation and entering final judgment for Vought.

After the trial on the merits of *Dailey I*, but before judgment was rendered, Dailey filed suit against Vought alleging his July 1993 layoff was the result of race discrimination and retaliation in violation of Title VII, No. 3:94-CV-0325-G in the District Court, Appeal No. 95-10437 in the Fifth Circuit Court of Appeals (hereinafter referred to as "*Dailey II*"). He subsequently attempted to amend *Dailey II* to include three additional claims; that Vought violated the ADA, Title VII and § 1981 when it failed to return him to work in October of 1992. Before the District Court ruled on the motion to amend, Dailey withdrew that motion and filed a third action with the ADA, Title VII and § 1981 claims, No. 3:94-CV-1214-X in the District Court, Appeal No. 96-10437 in the Fifth Circuit Court of Appeals (hereinafter referred to as "*Dailey III*"). *Dailey III* was subsequently consolidated with *Dailey II* and both cases were transferred to the District Court that heard *Dailey I*.

In the consolidated action of *Dailey II* and *Dailey III* the District Court ruled as follows:

1. With regard to the layoff claim, Dailey had presented no more evidence of discrimination than he presented during the trial of *Dailey I*, which was insufficient to demonstrate any race discrimination or retaliation occurred justifying summary judgment for Vought;

2. Dailey and his counsel failed to conduct a reasonable inquiry into the facts before filing *Dailey II* challenging the layoff, supporting the imposition of sanctions against both Dailey and his counsel;

3. Dailey's Title VII claim challenging his inability to return to work in October of 1992 asserted in *Dailey III* had already been ruled on and disposed of in *Dailey I*;

4. Dailey's § 1981 claim challenging his inability to return to work in October of 1992 asserted in *Dailey III* was barred as it could have been asserted in *Dailey I*; and

5. Sanctions under Rule 11 were appropriate against both Dailey and his counsel for filing the Title VII and § 1981 claims in *Dailey III*.[2]

The District Court granted Dailey's motion to sever the Title VII, § 1981 and sanctions rulings in *Dailey III*. *Dailey I, II* and those issues from *Dailey III* which were severed were consolidated before the Fifth Circuit Court of Appeals. In that consolidated Appeal, Dailey challenged the District Court's dismissal of his claims under the '91 Act and removal of the case from the jury docket; refusal to permit his layoff claim to be added to *Dailey I*;

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[2] Dailey has not challenged the amount of those sanctions in this Petition. Moreover, as a result of the failure to pay those sanctions, Dailey's counsel was suspended from practicing law in the United States District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals until the sanctions were paid, which has now occurred. *See* Appendix at 35a-46a. Dailey's counsel apparently did not inform the Court of this suspension, which was pending when the Petition was filed, as required by Rule 8, Supreme Court Rules.

dismissal of the ADA claim in *Dailey I* pending completion of the administrative process; entry of summary judgment for Vought on his layoff claim in *Dailey II*; dismissal of his Title VII claim in *Dailey III* on the basis it had been ruled upon in *Dailey I*; dismissal of his § 1981 claim in *Dailey III* as it could have been brought in *Dailey I*; and, entry of sanctions against Dailey and his counsel.[3] The Fifth Circuit Court of Appeals affirmed each and every ruling made by the District Court, finding that no reversible error had been committed.

B. STATEMENT OF FACTS.

While Dailey's statement of the facts is partially correct, it is incomplete and contradicts many of the findings made by the District Court. As Dailey did not appeal the findings of fact and conclusions of law entered by the District Court, they are binding for purposes of this Petition. Many of the allegations made by Dailey have already been conclusively resolved by the District Court in a manner which does not support Dailey's rendition of the facts. For what would appear to be obvious reasons, Dailey did not include the District Court's findings with his Petition. Therefore, for the Court's edification, they are attached hereto as an Appendix.

In addition to failing to include the findings of fact, which are controlling, Dailey's statement of facts is full of inadmissible and non-record evidence, opinion, argument, invective and attacks on the lower court judges.

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[3] Dailey did not appeal the findings of fact and conclusions of law entered by the Court after the trial of *Dailey I*.

The following statements made by Dailey are inaccurate, inadmissible or not contained within the record:

1. Dailey alleges he filed a charge of disability discrimination with the EEOC after he was not returned to work in October of 1990. Petition at 5. The only EEOC charge filed at that time, however, alleged race discrimination and retaliation, not disability discrimination as the ADA was not even effective until July of 1992.

2. There is no evidence in the record that Mr. Skinner's comments about interracial marriages were made during a discussion of a campaign flier which had been defaced. Petition at 5. In fact, as the District Court found, Dailey did not complain about the defacing of his campaign literature until four months after it occurred. Appendix at 3a, ¶ 18.

3. There is no evidence that the District Court ever attempted to limit the trial of *Dailey I* to only two days. Petition at 8. This allegation is apparently made in order to demonstrate there is some basis for Dailey's allegations that he and his counsel have been abused by both the District Court and Court of Appeals. This allegation, however, was not raised before either the District Court or Court of Appeals.

4. Dailey also takes a statement of the District Court out of context, alleging the District Court accused him of being "greedy" and threatening him with years of appeals. Petition at 9. There is no evidence in the record of these statements, nor was this allegation raised before the Court of Appeals.

5. There is no evidence of what settlement offers were made during trial of *Dailey I*, yet Dailey informs the Court about settlement discussions. Petition at 9. Offers of settlement which may have been made are not admissible, are not contained in the record of this matter, and are not relevant to disposition of this Petition. *See* Rule 408, Federal Rules of Evidence.

6. The District Court did not find that Dailey's layoff claims were duplicative of the claims asserted in *Dailey I*. Petition at 10. Rather the District Court held that Dailey presented no more evidence of discrimination than he had presented during trial of *Dailey I*, which was insufficient to demonstrate that a violation of Title VII had occurred. Petition at 21a, 27a.

7. Dailey's rendition of the facts on pages 12 and 13 of the Petition is no more than additional argument, which will properly be addressed *infra*.

8. In his argument, Dailey incorrectly states the Department of Labor had ordered Vought to reinstate him and that there was no avenue of appeal, a fact conveyed to Vought.[4] Petition at 6, 13. There is no evidence to support these statements.

9. Dailey incorrectly asserts that the District Court in *Dailey I* simply "declined to consider" his claims that

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[4] Although the Department of Labor charge was settled and Dailey agreed not to use the settlement agreement, which contained the Department of Labor's initial findings, for any purpose, over objection of counsel, during the course of trial and continuing through these appeals, Dailey has repeatedly violated the terms of that settlement agreement.

he was the victim of race discrimination and retaliation when he was not permitted to return to work in October of 1992. Petition at 19-20. The District Court found that Dailey did not have a Title VII claim arising out of the October of 1992 events as he failed to include anything other than disability discrimination as basis for the EEOC charge he filed concerning October of 1992 attempt to return to work. Petition at 14a. The issue was whether Dailey had a valid Title VII race discrimination claim relating to October of 1992 and the District Court held a race discrimination claim could not lie unless an EEOC charge had previously been filed. Petition at 14a, 15a.

10. Dailey also alleges he argued to the District Court in *Dailey I* that he had filed a race discrimination charge concerning his October of 1992 inability to return to work, justifying inclusion of that claim in that first suit. Petition at 8. That statement is not supported by the record as Dailey argued he did not file a charge because it was not necessary to do so.

ARGUMENTS SUPPORTING DENIAL OF THE PETITION

A. THE DECISIONS OF THE DISTRICT COURT NOT TO PERMIT DAILEY TO ADD NEW AND DIFFERENT CAUSES OF ACTION TO *DAILEY I* WERE CORRECT AND DO NOT WARRANT REVIEW BY THIS COURT.

1. The Decision of the District Court to Dismiss Dailey's Title VII claim relating to October of 1992 was correctly affirmed by the Fifth Circuit.

Dailey argues that once he filed his first lawsuit against Vought, he should have been allowed to continue

asserting new and different causes of action at his whim, including up until the eve of trial. In support of this argument, Dailey contends that Vought's actions constituted a continuing violation and that the additional actions were all related acts of discrimination against Dailey. There is, however, no legal support for Dailey's position.

The Fifth Circuit and District Court correctly determined that Dailey was required to file new EEOC charges for the subsequent actions which he alleges constituted discrimination. That determination was consistent with previous Fifth Circuit precedent, as that court has held:

> Discrete acts of discrimination which occur after the filing of an EEOC complaint must first be reviewed administratively before such acts may serve as the basis for a finding of discriminatory conduct justifying remedial action by the court.

Ray v. Freeman, 626 F.2d 439, 442 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981). The Fifth Circuit noted that additional claims could be made if they served to clarify the existing ones, not to add new acts of discrimination. *Id.* at 443. In the instant case, Dailey attempted to add an entirely new complaint – that he was not reinstated in October of 1992 – two years after he filed his original race discrimination charge. The failure to be rehired or reinstated is a separate and distinct action for which a separate charge must be filed. *Woodburn v. LTV Aerospace Corp.*, 531 F.2d 750, 751 (5th Cir. 1976); *Redd v. Fisher Controls*, 814 F. Supp. 547, 548-50 (W.D. Tex. 1992), *aff'd*, 35 F.3d 561 (5th Cir. 1994); *see also Kuriakose v. Howard University*, 35 Fair Emp. Prac. Cases (BNA) 1601, 1602 (D.D.C. 1984) (finding no statutory, case law or common

sense support for the proposition that a violation continues until an individual is rehired).

Contrary to Dailey's assertions, the Fifth Circuit's decision did not conflict with previous decisions rendered by it, by other Courts of Appeals, or with any decisions rendered by this Court. Two years after he was denied the opportunity to return to work, he attempted to return again, even though there had been no real change in his circumstances – he still asserted he could return only with a twenty pound lifting restriction. It is clear that this new attempt to return was designed solely to permit him to file an EEOC charge alleging disability discrimination. The ADA became effective in July of 1992 and Dailey wanted to assert more claims against Vought. The District Court correctly held that a continuing violation was not something that continued indefinitely into the future, but was a theory used to permit introduction of past actions which occurred either before the passage of Title VII or occurred outside the 300 day time period for filing a charge of discrimination. *Rendon v. AT&T Technologies*, 883 F.2d 388, 395 (5th Cir. 1989). Dailey easily could have included any additional type of discrimination on his October 1992 EEOC charge. The fact that he did not choose to assert anything other than disability discrimination does not demonstrate that the District Court was incorrect in not allowing him to attempt to change the basis for his charge long after the time period for so doing had expired.[5]

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[5] Dailey also alleges that after the District Court dismissed his October 1992 Title VII claim he returned to the EEOC and reopened his ADA charge. Dailey cites no authority for the

Since Dailey did not file a Title VII discrimination charge challenging his October of 1992 attempt to return to work, the District Court correctly held that he could not assert a Title VII claim, either in *Dailey I* or subsequently. The Fifth Circuit correctly affirmed that decision based upon its own precedent and precedent from other circuits. Accordingly, there is no basis or reason for this Court to further review those decisions and the Petition should be denied.

2. The Fifth Circuit correctly affirmed the District Court as it did not abuse its discretion in refusing to permit Dailey to add his layoff claims to *Dailey I*.

Dailey also complains that the District Court should have permitted him to add claims that Vought violated Title VII and the ADA when he was laid off based upon his seniority in July of 1993, and that the Fifth Circuit incorrectly affirmed those decisions. Dailey's main argument centers solely around his desire to have had a trial by jury on all of his claims. In making that argument, however, Dailey fails to acknowledge the standard governing the District Court's actions.

The standard for reviewing a district court's decision not to permit an amendment to the pleadings is abuse of discretion. *See Ashe v. Corley*, 992 F.2d 540, 542-43 (5th Cir.

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proposition that an administrative agency can overrule a district court and reopen a claim which has already been dismissed as untimely. Indeed, common sense would indicate no such authority exists nor could exist in the present judicial system.

1993). In *Dailey I*, Dailey made two attempts, both after the deadline for filing amendments to the pleadings, to add his layoff claims to that suit. The District Court could have simply denied both requests as being untimely. *Woods v. Whitley*, 933 F.2d 321 (5th Cir. 1991); *Gregory v. Mitchell*, 634 F.2d 200, 203 (5th Cir. 1981). With regard to the first attempt to amend, the District Court noted that Dailey had not fulfilled the administrative prerequisites as no EEOC charge had been filed challenging his layoff. As set forth *supra*, a new EEOC charge is required when challenging new or different actions of an employer. *Ray, supra*, 626 F.2d at 442. Therefore, the District Court correctly denied the first motion to amend.

When the second untimely motion to amend was filed the District Court determined that as the discovery cutoff had passed and the case was ready for trial, Vought would be prejudiced if Dailey were permitted to inject entirely new issues into the trial. Finding that one party would be prejudiced by the amendment is a legitimate reason for denying a motion to amend and does not demonstrate an abuse of discretion. *Ashe, supra*, 922 F.2d at 542-43. Dailey was not denied the opportunity to pursue his layoff claims, he was just denied the opportunity to insert them in a case which was going to trial in less than a month. Under these circumstances there could be no abuse of discretion by the District Court and the Fifth Circuit correctly affirmed each of those decisions. Since the issue is not new to the federal judicial system and there are no conflicting decisions from any circuit court, there is no basis upon which to grant Dailey's Petition on this issue.

3. The District Court was also correct in requiring Dailey to complete the administrative process before litigating his ADA claim arising out of his October of 1992 attempt to return to work.

Dailey argues that the District Court should have permitted him to litigate his October 1992 ADA claim in *Dailey I* even though it was still in the conciliation process at the EEOC. His argument is predicated on his belief that there would be no settlement, so he was excused from satisfying the administrative prerequisites. As the District Court so astutely noted "so much for good faith efforts at settlement as required by Local Rule 9.1(a) and the good faith participation in the administrative process. . . . " Petition at 18a. Dailey argues that conciliation is not a right of a defendant in a discrimination matter. While that may be true, it ignores the fact that the statute itself requires that the parties engage in conciliation in an attempt to avoid litigation. There is no authority, from this Court, the circuit courts, or Congress itself, that permits a discrimination plaintiff to determine when, whether and how to satisfy these prerequisites. The District Court correctly held that Dailey's ADA claim regarding his October of 1992 attempt to return to work was premature and that it could not properly be asserted until the administrative process was completed. *See Johnson v. United States*, 522 F.2d 1128, 1130-31 (8th Cir. 1975) (holding the requirement that the administrative prerequisites will not be waived merely because a plaintiff believes they will be unsuccessful); *Khader v. Aspin*, 1 F.3d 968, 971 (10th Cir. 1993) (holding the administrative process will

not be waived merely because a complainant is frustrated with the process).[6]

Dailey also attempts to argue that he was prejudiced by bureaucratic ineptitude and even frames one of his questions at issue to imply this Court should resolve the issue of whether a plaintiff who inadvertently files with the wrong federal agency should be penalized for that filing. That issue, however, was not presented to the District or Circuit Courts and seeks to imply that situation occurred in the instant matter. What actually occurred, however, was succinctly summarized by the District Court:

> Plaintiff filed a complaint with the OFCCP on November 12, 1992, alleging disability discrimination, a charge arising under both Section 503 [of the Rehabilitation Act] and the ADA. On November 20, 1992, he filed a separate ADA charge with the EEOC, challenging the same action as in the OFCCP complaint. Plaintiff apparently did not inform the EEOC that he had already filed the OFCCP complaint, and the EEOC therefore did not decline to accept the charge or dismiss it, but instead issued a right to sue letter. Plaintiff concedes that if the OFCCP complaint is settled, his ADA claims will be moot as a result. He contends that the flaw in Defendant's reasoning is that the OFCCP complaint may be settled.

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[6] The District Court also noted that as the matter was ready for trial, it was too late to inject yet another new cause of action into the case. Again, this ruling was based upon common sense and the avoidance of prejudice, and it did not constitute an abuse of discretion. *Ashe, supra*, 922 F.2d at 542-43.

> It appears that Plaintiff has managed to create just the sort of confusion and duplication of effort that Congress attempted so copiously to prevent by delegating authority to the administering agencies to harmonize potential duplication between the Rehabilitation Act and the ADA. Because the EEOC, had it known of Plaintiff's earlier OFCCP complaint, would have declined Plaintiff's ADA complaint, it would not have issued a right to sue notice. Rather than add to the confusion that Plaintiff has created, the Court determines that the better course of action would be to allow the administrative process to operate the way Congress intended, and dismiss Plaintiff's ADA claims. As both parties agree, if the OFCCP process is successful, the ADA claims are moot, if not, it will be referred to the EEOC for conciliation, and Plaintiff may then pursue it as he likes.

Petition at 8a. Any problems created by filing with one agency not the other were created by Dailey and are not the result of improper interpretation of the law by the courts such that this Court should consider the issues raised by Dailey. Since the District Court and Fifth Circuit decisions were consistent with the statutory mandates and the precedent of all other circuits, there is no basis upon which to grant Dailey's Petition as it applies to his ADA claims.

B. BY ALLOWING DAILEY TO ASSERT HIS OTHER CLAIMS IN OTHER LAWSUITS, NEITHER THE DISTRICT COURT NOR THE FIFTH CIRCUIT VIOLATED ANY OF DAILEY'S CONSTITUTIONAL RIGHTS.

Dailey's main argument is that by denying the various motions to amend and by not permitting him to

assert claims which were not supported by an underlying EEOC charge, the lower courts denied him of his constitutional right to have a jury decide each and every one of his claims. It is his contention that even though his various claims arose at different points in time, he was entitled to have all his claims decided in a single lawsuit, with a jury as the finder of fact. One of Dailey's complaints is that the District Court incorrectly removed *Dailey I* from the jury docket. The District Court removed the case from the docket as the only claims remaining for trial in *Dailey I* were Dailey's Title VII race and retaliation claims relating to the time period up to and including October of 1990. Since the '91 Act has been held not to be retroactive, the District Court's ruling was correct and the Fifth Circuit's affirmance is also correct.

Dailey relies upon *Lytle v. Household Manufacturing*, 110 S. Ct. 1331 (1990), to support his argument that he was improperly denied the right to a trial by jury on his claims. The facts of *Lytle*, however, are clearly distinguishable and do not provide support for Dailey's argument. In *Lytle*, the plaintiff simultaneously brought both a Title VII and § 1981 claim over a single event. The district court determined that the Title VII claim, which was to be heard by the court, should be heard before the § 1981 claim, which would be heard by a jury. This Court, however, found that process to violate the plaintiff's seventh amendment right to a trial by jury on his legal claims, as any findings made by the court in the Title VII trial would be binding on the jury in the § 1981 trial.

Unlike *Lytle*, Dailey did not bring a § 1981 claim concerning his inability to return to work in October of 1990. Therefore, his claims were not split. Since he was

not entitled to a jury trial on his October of 1990 Title VII claims, the District Court committed no error in holding a bench trial in *Dailey I*.

The only race discrimination claims asserted in *Dailey I* concerning Dailey's unsuccessful attempt to return to work in October of 1992 were his Title VII claims. As set forth *supra* those claims were properly dismissed as Dailey failed to satisfy the administrative prerequisites necessary to bring that action. Dailey did not allege, in *Dailey I*, that § 1981 was violated in October of 1992, although he clearly could have done so. Apparently, Dailey believes he was entitled to a jury trial because a § 1981 claim could have existed, even though he failed to assert it.

The doctrine of *res judicata* (also referred to as collateral estoppel) is used to prevent litigation of claims which were previously litigated **as well as claims that could have been litigated in a previous lawsuit**. *Ocean Drilling & Exploration v. Mont Boar Rental Services, Inc.*, 799 F.2d 213, 216 (5th Cir. 1986); *Nilsen v. City of Moss Point*, 701 F.2d 556, 560 (5th Cir. 1983) (en banc); *Stevenson v. International Paper Co.*, 516 F.2d 103, 108 (5th Cir. 1975). This doctrine has been used to prevent subsequent employment discrimination litigation involving the same facts, yet arising under a different statute. *Mills v. Des Arc Convalescent Home*, 872 F.2d 823, 826 (8th Cir. 1989); *Nilsen, supra*, 701 F.2d at 563. Dailey could have and should have asserted his § 1981 claim in *Dailey I* when he attempted to assert his Title VII claim. His failure to do so not only justified the District Court's removal of *Dailey I* from the jury docket, but it also justified the District Court's dismissal of the § 1981 claim when it was asserted in subsequent litigation in *Dailey III*. By dismissing the

§ 1981 claim in *Dailey III* on the basis that it should have been included in *Dailey I*, the District Court did not deny Dailey a jury trial. Any error was committed by Dailey in not asserting his § 1981 claim in a timely manner.

The District Court also dismissed Dailey's Title VII claims in *Dailey III* on the basis it had already ruled that Dailey could not assert those claims in *Dailey I* as he had not satisfied the administrative prerequisites. While Dailey prefers to characterize that decision as an invitation to file another lawsuit, it cannot logically be read that way. The District Court clearly decided that Dailey's Title VII claims relating to October of 1992 were not timely. Petition at 14a-15a, 24a. Since it is proper to dismiss subsequent litigation of issues already decided, the District Court was correct in dismissing the Title VII claims asserted in *Dailey III*. *Montana v. United States*, 99 S. Ct. 970, 973 (1979).

Any procedural problems resulting in Dailey's inability to have a jury decide *Dailey I* were not caused by the District Court splitting any claims. Rather, Dailey's failure to satisfy the administrative prerequisites on his Title VII October 1992 claim and his failure to assert his § 1981 claim in *Dailey I* created a situation in which no jury issues existed in *Dailey I*. In addition, since the District Court had already dismissed the October 1992 Title VII claims in *Dailey I*, there was no basis to allow those same claims to be litigated in *Dailey III*.[7] There being no error by either the District Court or the Court of Appeals with

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[7] *See supra* footnote 5.

regard to the dismissal of these claims, there is no reason to grant the Petition.

C. DAILEY'S REMAINING CLAIMS WERE DISMISSED ON SUMMARY JUDGMENT GROUNDS, DEMONSTRATING HE WOULD NOT HAVE HAD ANY CLAIMS TO GO BEFORE A JURY EVEN IF ALL HIS CLAIMS WERE ASSERTED IN *DAILEY I*.

Dailey's arguments center around his contention that had he been allowed to assert all his claims against Vought he would have received a trial by jury, and apparently would have received a different result. What Dailey does not recognize, however, is that the claims that were asserted in *Dailey II* and *Dailey III* were so weak as to be unable to withstand a motion for summary judgment. Therefore, it is clear that even if all the claims had been asserted in a single action, those claims entitling him to a jury trial would have been disposed of short of trial in any event. As set forth above, the Title VII and § 1981 claims surrounding Dailey's October of 1992 attempt to return to work were properly disposed of on the basis that there was no underlying EEOC charge to support the Title VII claim and the § 1981 claim was barred by the doctrine of *res judicata* as it was never asserted in *Dailey I*. That leaves only Dailey's layoff and ADA claims as those which may have been heard by a jury.

On the layoff claim, Vought presented evidence of a legitimate non-discriminatory reason for Dailey's layoff – it was required by the terms of the collective bargaining agreement, based upon Dailey's seniority. The District Court, in *Dailey I*, held that Dailey did not present any

evidence to prove the reasons advanced by Vought in that case were merely a pretext for discrimination. In response to the motion for summary judgment in *Dailey II*, Dailey merely reiterated the same evidence he had presented in *Dailey I*. The District Court held that since Dailey had presented no more evidence of discrimination than that which had already been held to be insufficient in *Dailey I*, he could not defeat the motion for summary judgment. Likewise, on the ADA claim in *Dailey III* that remained before the District Court, Vought was also granted summary judgment.[8] Therefore, since he could not overcome those motions, he did not have sufficient evidence to go before a jury with either his layoff or ADA claims. If Dailey had been permitted to amend his complaint to include those additional causes of action in *Dailey I*, it is clear that they would have been disposed of before trial. That result would have, once again, left only Dailey's Title VII claims relating to October of 1990 as the ones to be tried. As even Dailey recognizes, those claims do not entitle him to a trial by jury.

What Dailey would like this Court to do is find that there were procedural errors committed which justify throwing out all the decisions of the lower courts and allow him to retry all his claims in one single suit. Since the District Court has determined that most of Dailey's claims do not raise any genuine issues of material fact and that Vought was entitled to judgment as a matter of law, a remand would be a purely theoretical exercise

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[8] Dailey has appealed that decision and it is currently pending before the Fifth Circuit, Case No. 96-10286. Appendix at 18a-34a.

resulting in a tremendous waste of judicial resources. Vought would submit that when the record is clear that there will be no different result in a retrial, then there is no basis for reversing the lower courts. *See, e.g., Halbert v. City of Sherman, Texas*, 33 F.3d 526, 530 (5th Cir. 1994). Therefore, the Court should deny Dailey's Petition.

CONCLUSION

Dailey has not identified any provision of the District Court's decisions or the Fifth Circuit's decision affirming the District Court which conflicts with a decision of this Court. Nor has he challenged any of the findings of fact entered by the District Court. What Dailey is attempting to do is wipe the slate clean and start all over again. Were his arguments adopted, litigation involving employees would rarely become final as employees could just continue to raise new claims on the eve of trial and split causes of action in order to get more than one bite at the apple. This result is not justified by the precedent of this Court or any other federal court. Dailey has not identified any conflict between the circuits nor critical issue which warrant consideration by this Court. For the reasons set

forth above, Vought respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
LTV AEROSPACE AND	§	CASE NO.
DEFENSE COMPANY,	§	3:91-CV-1327-X
	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, after hearing the trial on the merits of all claims remaining in the above referenced matter and after a careful review of the evidence, and argument, the Court enters the following findings of fact and conclusions of law. Any finding of fact which is a conclusion of law is deemed to be such, and vice versa.

FINDINGS OF FACT

1. Plaintiff Ollie Dailey (hereinafter "Dailey"), is an African American male who was hired by LTV Aerospace and Defense Company (hereinafter "LTVAD") in 1984 as a numerical control machinist, B class.

2. A B class machinist is a lower skilled position than an A class machinist. From January 10, 1990 through October of 1990, Dailey worked as a B class machinist in department 161-5.

3. In August of 1992, part of the aerospace operations of LTVAD were sold and became Vought Aircraft

Company (LTVAD and Vought Aircraft Company will hereinafter be referred to as "the Company"),

4. Dailey remained an employee until July 31, 1993, when he was laid off.

5. In January of 1990, Dailey injured his back. At that time, he was working on the third shift.

6. Dailey filed a workers' compensation claim for the January 1990 injury.

7. On January 9, 1990, Dailey's physician Dr. A. J. Morris limited him to lifting to [sic] more than 25 pounds.

8. The Company honored Dailey's restriction by allowing him to choose which machines he would work on that would not violate his restrictions.

9. On February 7, 1990, Dailey's physician indicated Dailey could not perform any work and Dailey was placed on leave.

10. At the end of February 1990, Dailey returned to work with a 15 pound lifting restriction.

11. Once again, the Company honored Dailey's restrictions by permitting him to choose the machines on which he would work.

12. Despite the Company's accommodation, Dailey argued that the work he was doing exceeded his restrictions.

13. Although Dailey contended he could not perform the work he assigned, his supervisors observed that he was able to do the work, despite his protestations to the contrary.

14. In May of 1990, Dailey was transferred to the first shift.

15. Dailey filed a grievance alleging the work he was doing exceeded his restrictions in June of 1990. In order to determine whether the work was within Dailey's restrictions, the Company had an agronomic evaluation conducted on the machine on which Dailey had chosen to work. That study demonstrated that the work Dailey was performing required him to lift no more than 14.92 pounds, which was within his restriction of not lifting more than 15 pounds.

16. Dailey was receiving therapy for his back injury, which interfered with his ability to work the first shift. Therefore, as an accommodation to Dailey, the Company transferred him back to the third shift in July of 1990 to enable him to continue to receive therapy.

17. In September of 1990, Dailey was transferred back to the first shift as the Company could not continue to use him on the third shift because he was not productive, since he was limited in the work he could perform. The Company determined he would be more productive on the first shift. There was no supervision on the third shift. After Dailey was transferred back to the first shift, there were no B class employees on the third shift (Dailey was a B class machinist) in department 161-5.

18. On October 15, 1990, Dailey filed an EEOC charge contending that he was transferred back to the first shift in September of 1990 because of his race. Dailey also complained that he had been denied training on the newer machines since October of 1989 because of his race.

19. The machines on which Dailey desired to be trained were 5 axis K & T machines. The employees who had been in the unit the longest received training on new equipment. Dailey was relatively new to the unit. Because of his restrictions Dailey was unable to perform all work on those machines. Therefore, he did not receive training prior to October of 1990.

20. On September 5, 1990, Dailey's physician submitted two separate forms detailing Dailey's restrictions. One said that Dailey's lifting restriction was changed from 15 pounds to 50 pounds "as tolerated". The other said that Dailey could not engage in prolonged standing, walking, lifting and/or bending, but did not limit the amount that Dailey could lift.

21. On September 25, 1990, Dailey's restrictions changed again, and Dailey was limited to not lifting more than 25 pounds.

22. On September 30, 1991, the EEOC determined that Dailey was not discriminated against with regard to the suspension and failure to return him to work.

23. On October 16, 1990, when he arrived at work, Dailey found that his tool box had been moved. He became very angry and abusive and began yelling obscenities, including "tell those fucking white boys to leave my tool box alone." Several co-workers complained about Dailey's statements and treatment of them.

24. An investigation was conducted by labor relations, which included talking to Dailey. Although Dailey admitted to making the above comment, he refused to provide a statement to labor relations.

25. Dailey was sent home on October 16 pending the outcome of the labor relations investigation.

26. Three days later, on October 19, while the investigation into his abusive conduct was pending, Dailey went to his physician and received a note indicating the he was not capable of working. I find this and the previous lifting restrictions cited above were based on the subjective views of Dailey and not based on any reasonable medical diagnosis of him by Dr. A.J. Morris.

27. I find that Dr. Morris would provide documents on his letterhead that said whatever Dailey wanted them to say and would be stamped with his facsimile stamp by the Doctor's secretary. I find that on these occasions Dr. Morris was selling Dailey stationery with Dailey's input for the purpose of giving it to others for their action in reliance thereon, as opposed to giving him documentation of the Doctor's medical diagnosis and treatment of Dailey.

28. The investigation by labor relations revealed that three other employees had been disciplined for making abusive or derogatory statements in the workplace. Each of those employees was white and each received a three day suspension.

29. On October 22, 1990, Dailey was directed to report to labor relations, at which time he was told that he would receive a three day suspension for his abusive outburst on October 16, 1990.

30. During the October 22 meeting in labor relations, Dailey presented his physician's note that stated he could not work. Dailey's supervisors informed him that

given that his restrictions kept changing and that Dailey contended he could not work within his restrictions, there was no B class machinist position available for him. Dailey was then sent to the medical department.

31. On October 23, 1990, Dailey filed an EEOC charge alleging that he was suspended on account of his race and in retaliation for complaining about discrimination in the workplace.

32. Dailey had another appointment with his physician on October 26, 1990. He received another release which stated Dailey could return to work when his lifting restriction of 20 pounds was honored by the Company. Since Dailey's restrictions kept changing, and Dailey had indicated he could not work within the previous 15 pound limitation, the Company determined that there was no B class machinist position available for him.

33. On November 6, 1990, Dailey amended his previous EEOC charge challenging his suspension to allege that he was not being returned to work on account of his race and in retaliation for having made previous complaints.

34. Also on November 6, 1990, Dailey filed a complaint with the Office of Federal Contract Compliance Programs (hereinafter "OFCCP"), alleging he was not returned to work on account of his race and because he was handicapped.

35. On November 15, 1990, Dailey's physician responded to a letter from the Company medical director indicating that Dailey would never be able to perform the B class machinist job.

36. On December 5, 1990, Dailey's physician submitted a disability form to the Company stating that Dailey was unable to perform any work. In relation to the Plaintiff's workers' compensation claim an independent medical evaluation was done. Plaintiff's own exhibit 52, a report dated March 11, [sic] 1991, from the examining physician, one John G. Steele, M.D., contains the following:

> *. . . he continued to work until October, 1990, when he indicates that his foreman did not wish to live with this [weight] restriction any longer and he was forced to go off duty again. (emphasis added)*

As one can easily see, and the Court finds, in March of 1991 Plaintiff Ollie Dailey told this doctor involved in the workers' compensation case (when it suited his particular litigation purposes at that particular time) that the employment decisions of October 1990 were because of the weight *restriction*, not race, retaliation or because of any "setup".

37. On August 26, 1991, Dailey's physician released him to work with a 10 pound 6 restriction. Dailey obtained the release in order to determine whether there was another position in the Company which he could fill.

38. In accordance with the procedure on returning union employees to work, a return to work committee canvassed the existing job openings to determine if there was a job which Dailey could perform with the 10 pound lifting restriction. A Tank/Cabin Sealer position was available, but it required that Dailey obtain a security clearance.

39. Dailey was not qualified to receive the security clearance because he had a criminal record. I find that this is why he was not offered the Tank/Cabin Sealer position.

40. After Dailey was denied that position, his physician submitted another form to the Company, on December 4, 1991, indicating that Dailey was unable to perform any work.

41. In December of 1991, Dailey's physician also submitted a form to the Texas Rehabilitation Commission stating that Dailey could perform some work, but that he had a five pound lifting restriction.

42. On December 16, 1991, Dailey's physician again increased his lifting limitation to 20 pounds.

43. On February 14, 1992, Dailey's physician submitted another form to the Company stating that Dailey was unable to perform any work.

44. As noted above, the Court finds as a fact that these changing restrictions are a sham and based on the evidence at trial the doctor's office was selling the Doctor's stationery to the Plaintiff and would put in writing whatever Plaintiff Ollie Dailey requested.

45. On February 14, 1992, the OFCCP determined that there was no discrimination, primarily because Dailey's restrictions kept changing and the Company could not determine what he was capable of doing on the job. Therefore, it dismissed his claim.

46. On April 8, 1992, Dailey's physician reaffirmed that Dailey was unable to perform any work, and further stated that the previous lifting limitation of 20 pounds

was for rehabilitation purposes only and was no longer applicable.

47. In September of 1992, Dailey's workers' compensation case went to trial and he *was awarded* damages *by the* jury.

48. *After* Dailey's workers' compensation trial was concluded, Dailey's physician again released him to work with a twenty pound lifting restriction. The restrictions did not continue to change after Dailey received his workers' compensation award.

49. Dailey attempted to return to his position as a B class machinist on October 6, 1992, with the new 20 pound lifting restriction. Dailey was not permitted to return to work. Dailey did not file a race discrimination charge challenging that decision.

50. Dailey was placed on layoff status on July 31, 1993.

CONCLUSIONS OF LAW

1. The Company is an employer covered by Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e(b).

2. Dailey's first claim is that he was transferred from the third shift to the first shift in September of 1990 on account of his race. In order to prove a prima facie case of discrimination, Dailey must demonstrate that he was qualified to remain on the third shift, i.e., that there was work he could perform on that shift. Dailey failed to satisfy this burden. Dailey was working under limitations in September of 1990, which even he admits limited the

type of work he could perform. The Company demonstrated that there was insufficient work for him to do on the third shift and Dailey presented no evidence to demonstrate the contrary.

3. Even if Dailey could demonstrate the existence of a prima facie case, the Company has articulated a legitimate, non-discriminatory reason for the transfer. The Company stated that Dailey could not continue to work on the third shift because he was not operating at 100% efficiency because of his restrictions. In addition, there was no supervision on the third shift. A11 [sic] employees on that shift, other than Dailey, were A class machinists who could handle any work that had to be done. No B class machinists remained on the third shift after Dailey was transferred.

4. Dailey presented no evidence of pretext. He testified repeatedly that he believes that discrimination is the root of all his problems, but such beliefs are not sufficient to demonstrate that the Company's reasons were a pretext for discrimination. *Aquamina v. Eastern Airlines, Inc.*, 644 F.2d 506 (5th Cir. 1981). He presented no evidence that other employees were treated differently. Nor did he present any evidence from which it could reasonably be inferred that the Company decided to transfer Dailey because he is an African American.

5. Dailey's second claim is that he was denied training on new equipment on account of his race and had been denied such training since October of 1989. There is no evidence that Dailey was not otherwise qualified to participate in the training from October of 1989 until

January of 1990, so Dailey has established a prima facie case.

6. The Company articulated a legitimate non-discriminatory reason for not training Dailey. All employees would eventually be trained on the new equipment. Training was generally done by class and seniority, although the supervisor did have discretion as to when to train employees. When Dailey transferred into the department in October of 1989, there were employees already in the unit who had more seniority than him who were also awaiting training. They were trained before Dailey. After January of 1990, Dailey was unable to do all the functions of his job because of his injury. Since the Company wanted to obtain maximum efficiency on the new equipment, it did not make sense to train Dailey, since he could not fully operate the equipment. Dailey left the workplace in October of 1990 and did not return. Therefore, he was not trained. Had he remained in the workplace and had his physician not indicated he was incapable of any work, he would have been trained on the equipment when time and productivity permitted.

7. Dailey also failed to present any evidence of pretext. Once again, his main support is his belief that he was not trained because of his race. Dailey also alleges that other black employees did not receive training until they complained that they had not been trained. Yet, the evidence demonstrated that the Company trained black, white and Asian employees and eventually trained all employees. No other employees had the same restrictions as Dailey, yet were permitted to train on the new equipment. The Defendant prevails on this claim.

8. The Plaintiff next complains about his three day suspension. Although Dailey admits to angrily and loudly making a derogatory remark using profanity in the workplace, he contends that he did not deserve to be suspended for three days and that he received the suspension on account of his race and because he previously complained about discrimination. The burden of establishing the inference of discrimination necessary to show a prima facie case of race discrimination may be satisfied as follows:

> In work-rule-violation discharge cases, to establish an inference of discrimination, the plaintiff must establish at trial by a preponderance of the evidence, "either that he did not violate the rule, or that, if he did, white employees who engaged in similar acts were not punished similarly." *Green v. Armstrong R.R. Co.*, 612 F.2d 967 (5th Cir. 1980); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1254-55 (5th Cir. 1977).

Gunner v. Chevron USA, 684 F. Supp. 916, 920 (E.D. Tex. 1988). Dailey admitted to making the statement "tell those fucking white boys to leave my tool box alone". Therefore he cannot claim that he did not violate the rule against such behavior in the workplace. Moreover, he presented no evidence that other, white employees who engaged in similar behavior were treated differently. In fact, the Defendant established that they were treated the same. Therefore, he cannot establish a prima facie case of discrimination.

9. Assuming arguendo a prima facie case, the Company articulated a legitimate non-discriminatory reason for the suspension. It is clear that a rule was violated. In

all other instances where the rule was violated, the employees involved received three day suspensions, the same punishment meted out to Dailey. In addition, in each of those other instances, the other employees were white.

10. Once again, Dailey presented no evidence of pretext. Therefore, he has not demonstrated that he was suspended on account of his race.

11. Dailey also contends that the suspension was done in order to retaliate against him because he frequently complained about discrimination in the workplace. In order to raise a presumption of discrimination in a retaliation case, a plaintiff must show:

> (1) he participated in a statutorily protected activity;
>
> (2) was the object of adverse employment action; and
>
> (3) there is a causal nexus between the activity and the adverse action. *DeAnda v. St. Joseph Hosp.*, 671 F.2d 850 (5th Cir. 1982).

Armstrong v. City of Dallas, 997 F.2d 62, 65 n.3 (5th Cir. 1993).

12. Dailey repeatedly filed grievances alleging discrimination in the workplace. He was suspended for three days. Some of the individuals involved in making the suspension decision were aware of Dailey's complaints about discrimination.

13. The Company presented uncontroverted evidence that all employees who engage in similar behavior receive a three day suspension. The discipline Dailey

received was the same as that received by white employees who made abusive and derogatory statements in the workplace, whether or not they complained about discrimination. Since the discipline was consistent with that given to all other employees, the Company satisfied its burden to demonstrate the existence of a legitimate non-discriminatory reason for the suspension.

14. Dailey alleges that someone moved his tool box to "set him up", knowing that he would blow up and make profane racist remarks and receive discipline for that conduct. There is absolutely no evidence, however, to indicate this allegation is anything more than a subjective belief held by Dailey. While there is evidence that Dailey can be abusive and difficult to work with, there is no evidence of a "conspiracy" or a "setup". Dailey's claim that he was suspended as an act of retaliation is rejected.

15. Dailey's final claim is that in October of 1990 he was not allowed to return to work on account of his race and in retaliation for complaining of discrimination. While Dailey was suspended he went to his physician and received a note indicating he was not capable of working. Therefore, at the conclusion of his suspension, it was Dailey's own action which prevented him from returning to work.

16. In order to demonstrate a prima facie case of discrimination, Dailey must demonstrate that he was qualified to return to work after his suspension. He cannot carry that burden. The Court finds from the evidence that the Company accommodated Dailey by permitting him to choose those machines on which he would work so as to comply with his restrictions. Even when given

this freedom of choice, Dailey repeatedly contended that he could not do the work assigned. At one point, in order to demonstrate to Dailey that he was not being forced to exceed his restrictions, the Company conducted an ergonomic study which showed Dailey would not have to lift more than 14.92 pounds, which was within his restrictions. Yet, Dailey contended he could not work.

During and after his suspension, Dailey's physician repeatedly changed Dailey's restrictions, and usually told the Company that Dailey was not capable of performing any work. It was not until after Dailey had received a workers' compensation award that the physician gave Dailey one final permanent restriction, in October of 1992.

This conclusion that Dailey has not established a prima facie case is bolstered by the finding of the OFCCP which, after investigating complaints of race and handicap discrimination, concluded that the Company was not able to determine what Dailey was capable of doing. Therefore, there was no discrimination in not returning Dailey to work in October of 1990.

17. Even if Dailey could establish a prima facie case, the Company has carried its burden to demonstrate that it had a legitimate non-discriminatory reason for its decision not to return Dailey to work in October of 1990. The Company could not tell what Dailey was capable of doing. Despite its efforts to accommodate Dailey, Dailey always argued that it was not enough. Finally, Dailey's physician sent statements to the Company stating that

Dailey was not capable of performing any work. Therefore, the Company could not return Dailey to his B class machinist position.

18. Dailey has not offered any credible evidence to demonstrate that his race was the real reason that the Company failed to return him to work in October of 1990. When his suspension was over, Dailey was not capable of returning to work. In addition, at that time the Company explained to Dailey that it could not continue to accommodate him as it had in the past as his inability to perform his job fully and completely was impacting production. Dailey has presented no evidence to contradict any of this evidence. As with his other claims, Dailey's only support is his subjective belief that he was the victim of race discrimination, which is not sufficient.

Dailey also attempts to argue that there were a few racist comments made in the workplace and placed on union campaign literature. None of those comments were made to Dailey. The defacing of his campaign literature was not reported to management for four months. They were so remote in time with regard to the decision not to return Dailey to work so as not to allow a reasonable inference that the real reason Dailey was not returned was on account of race.

Dailey's burden is to demonstrate that but for his race he would have been returned to work in October of 1990. The Court finds and concludes from the evidence that he has failed in carrying his burden.

19. As with his suspension, Dailey has made out a prima facie case of retaliation, for the same reasons. However, the Court concludes that the same reasoning with

regard to the Company's legitimate non-discriminatory reason in response to the claim of race discrimination applies to the retaliation claim as well.

20. Absent proof that the Company intended to discriminate against him because of his race or as an act of retaliation, Dailey is not entitled to judgment. *See St. Mary's Honor Center*, 113 S.Ct. 2741 (1993). Dailey has not demonstrated that the Company's reasons were a pretext to retaliate against him.

21. Any finding of fact which is a conclusion of law, or vice versa, shall be so deemed.

Based upon the above findings of fact and conclusions of law, Plaintiff's suit is hereby dismissed in its entirety, with prejudice and Defendant is awarded all costs incurred herein.

SO ORDERED, this 6th day of January, 1995.

/S/

JOE KENDALL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	3:94-CV-1214-X
	§	
VOUGHT AIRCRAFT CO.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

(Filed March 8, 1996)

Now before the Court is the Defendant's Motion for Summary Judgment filed on July 31, 1995. Plaintiff's response was filed on November 27, 1995, after the Court granted two extensions. After consideration of the motion, response, reply, the pleadings on file and the applicable law, the Court is of the opinion that the motion should be, and is hereby, **GRANTED.** The Clerk of the Court is **ORDERED** to close this case and to provide all parties with notice of its dismissal.

Factual Background

This is an employment discrimination case. Plaintiff, an African-American, has worked off and on for the defendant as a class B machinist, since being hired in 1984. At various times, he has been laid off and recalled depending upon the defendant's work requirements and order volume. Plaintiff is currently working for defendant as a class B machinist with no working restrictions due to his alleged disability.

In January 1990, Dailey suffered an on-the-job injury which he claims resulted in a recognizable disability under the Americans with Disabilities Act. As a result of this injury, his doctor placed him on various work restrictions concerning the amount of weight he could lift. These restrictions varied frequently, hitting virtually every five-pound increment between five and fifty pounds. Plaintiff's doctor stated on various occasions that plaintiff would be unable to work at all. Plaintiff was also transferred back and forth from the first shift to the third shift several times. Defendant contends that these transfers were due to plaintiff's therapy schedule or otherwise related to his work restrictions, while plaintiff claims that at least one transfer was motivated by racial animus[1]. Eventually, plaintiff was laid off by the defendant. When he was not returned to work as quickly as he thought he should be, plaintiff filed the 1991 action.

Although, at the time, his physician had recently opined that he would not be able to return to work, plaintiff filed a complaint with the Office of Federal Contract Compliance Programs (OFCCP) alleging that he was not returned to work because of his handicap. Almost

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[1] The history of Mr. Dailey and his various claims against Vought Aircraft Company is a long and involved one. Dailey has asserted that almost all actions ever taken against him while he was employed with the company were a result of racial animus, retaliation, and/or disability discrimination. For a more detailed history of the factual scenarios involved in these various and sundry claims see 3: 91-CV-1327-X, *"Dailey I"* which was litigated in a five-day bench trial resulting in a dismissal of Dailey's Title VII claims and 3:94-CV-325-X, *"Dailey II"* which has been previously dismissed by this Court because it was based on identical facts and allegations as the 1991 action.

immediately after that filing, he filed an EEOC grievance based on the exact same facts, undaunted by the regulations which prohibit this. This Court dismissed without prejudice Dailey's ADA claims in order for the proper administrative avenues to be followed. Now, nearly five years down the road from the first action, this Court has been asked to adjudicate Dailey's ADA claims.

Plaintiff's final claim against the beleaguered defendant involves an alleged violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. In this action, Dailey claims that the defendant's failure to return him to work in October 1992 was due to the company's discrimination of him on the basis of his alleged disability. The defendant moves for summary judgment based upon Dailey's inability to establish a prima facie case of discrimination under the ADA and, alternatively, Dailey's failure to overcome Vought's proffered legitimate non-discriminatory reason for its failure to return him to work in October 1992.

Standard of Review

The movant in a summary judgment context must show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 170 (5th Cir. 1991). The existence of a genuine issue of material fact is determined based on whether a fair-minded jury could return a verdict for the plaintiff based on the evidence presented. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986). The rules allocating the burden of proof guide a court in a summary judgment analysis, *Fields v. City of S.*

Houston, 922 F.2d 1183, 1187 (5th Cir. 1991), and such allocation depends on the burden of proof that would obtain at trial. *See Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 150 (5th Cir. 1991). The nonmovant is not required to respond to the motion until the movant properly supports his motion with competent evidence. *Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1675 (1992). However, once the movant has carried his burden of proof, the nonmovant may not sit idly by and wait for trial. *Page v. DeLaune*, 837 F.2d 233, 239 (5th Cir. 1988). When a movant carries his initial burden, the burden then shifts to the nonmovant to show that the entry of summary judgment is inappropriate. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). Although the nonmovant may satisfy this burden by tendering depositions, affidavits and other competent evidence,[2] "[m]ere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 82 (1992). Although a court must "review the facts drawing all inferences most favorable to the party opposing the motion," *Rosado v. Deters*, ___ F.3d ___, No. 92-4109, 1993 WL 393601, at *2 (5th Cir. Oct. 22, 1993) (quoting *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986)), the nonmovant may not rest on mere allegations or denials in its pleadings; instead, "the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). However,

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[2] *See* FED. R. CIV. P. 56(e).

merely colorable evidence or evidence not significantly probative will not defeat a properly supported summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The existence of a mere scintilla of evidence will not suffice. *Id.* at 252. When the nonmoving party fails to make the requisite showing and the moving party has met his summary judgment burden, the movant is entitled to summary judgment. FED. R. CIV. P. 56(c); *Campbell v. Sonat Offshore Drilling*, 979 F.2d 1115, 1119 (5th Cir. 1992).

Discussion

The ADA prohibits discrimination against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a); *see also Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995). The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8).

The legal standards applicable to discrimination cases contain a dance among shifting burdens of production. First, a plaintiff must establish a *prima facie* case, which gives rise to an inference of discrimination by showing that: (1) he or she suffers from a disability; (2) he or she is qualified for the job; (3) he or she was subject to

an adverse employment action; and (4) he or she was replaced by a non-disabled person or was treated less favorably than non-disabled employees. *See Norris v. Hart Marx Specialty Stores, Inc.*, 913 F.2d 253, 254 (5th Cir. 1990); *EEOC v. Brown & Root, Inc.*, 688 F.2d 338, 340-41 (5th Cir. 1982). These are the so-called "McDonnell Douglas" factors, after *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and they may be modified as necessary to conform to the facts of a particular case. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976).

By establishing a *prima facie* case, the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against him. *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2747 (1993). Next, the burden falls on the defendant to rebut the presumption by producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. *Id; see also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). While an employer need not prove the legitimate reason, it must produce some evidence to support the assertion. *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 395 *citing St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2748 (1993). As the Supreme Court has emphasized, although the burden of production shifts to the defendant, the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *St. Mary's* at 2747. If the employer produces any evidence "which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action," then the employer has satisfied its burden of production. *Id.* at 2748. The defendant's successfully carrying the burden of

production rebuts the *prima facie* case, which at that point drops from the case.[3] *Id.* The plaintiff then has the opportunity to put on evidence that the defendant's proffered reason was not the true one for the employment decision, but in order to show pretext, the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason. *Id.* at 2752 (emphasis in original).

A. Does Dailey Suffer from a Disability as Defined by the ADA ?

Although Dailey fails to present sufficient evidence on three of the four elements of a *prima facie* case of disability discrimination, failure to prove only one element will result in a summary judgment for the defendant. Accordingly, the Court will focus on Dailey's inability to prove that he is disabled as contemplated by the ADA and the regulations which interpret the statute.

The ADA forbids discrimination "against a qualified individual with a disability because of the disability of such individual. . . . " *Butcher v. Ingalls Shipbuilding,* 53 F.3d 723, 725 (5th Cir. 1995) *(quoting* 42 U.S.C. 12112(a)). The term "disability" as used in the ADA means:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

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[3] It is important to note that whether a defendant carries his burden of production involves no credibility assessment, "[f]or the burden-of-production determination necessarily *precedes* the credibility-assessment stage." *Saint Mary's Honor Ctr.,* 113 S.Ct. at 2748 (emphasis in Original). In other words, the Court is to take the defendant's rebuttal evidence as true. *Id.*

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. 12102(2)4.[4] The parties do not materially dispute the fact that Dailey has some type of physical impairment related to his back. However, "[a] physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA. The statute requires an impairment that substantially limits one or more major life activities. *Dutcher* at 726. The ADA defines neither "substantially limits" nor "major life activities," but the regulations promulgated by the EEOC under the ADA provide significant guidance. These regulations adopt the same definition of major life activities as used in the Rehabilitation Act. *Dutcher* at 726. *(citing Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir.1994), *cert. denied*, 115 S.Ct. 1104 (1995)). "Major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i). Whether an impairment "substantially limits[5]" a major life activity is determined in light of (1) the nature and severity of the

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[4] The Fifth circuit has noted that this definition of "disability" is substantially equivalent to that in the Rehabilitation Act, 29 U.S.C. § 701-797. *See Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995); *see also Chandler v. City of Dallas*, 2 F.3d 1385, 1391 n. 18 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1386 (1994).

[5] To substantially limit means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an Individual can perform a particular major life activity as compared to the

impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term impact. 29 C.F.R. § 1630, App., § 1630.2(j).

Based upon Dailey's affidavit, attached as an exhibit to his response of November 27, 1995, the relevant impairment for purposes of this suit, which addresses only his ADA claims, is the lifting restriction imposed by Dr. Morris of no more than twenty pounds. *See* Affidavit of Ollie Dailey at 2, ¶ 4. Exhibit M to the Pl's Rsp. If this restriction does not substantially limit a major life activity, defendant is entitled to summary judgment.

The Court first examines whether Dailey's impairment substantially limits a major life activity other than working. *See* 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630, App., ___, § 630.2(j) ("If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.") The Court has searched and scrutinized the summary judgment record before and it can find no scintilla of evidence that Dailey has appended or submitted which would support a conclusion that he is "substantially limited" with regard to a life activity other than working. The Court has examined the plaintiff's affidavit and the various letters from doctors which were included in the response and can find no

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condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 C.F.R. § 1630.2(j)(1)(i), (ii).

summary judgment evidence at all of a substantial limitation caused by his twenty-pound lifting restriction. The Court does not even find that Dailey makes an inadmissible conclusory statement that other life activities are affected. Dailey has offered no evidence on which a jury could find that this impairment substantially limited a major life activity.

Having found that Dailey has failed to present summary judgment evidence of a substantial limitation on a major life activity other than working, the Court turns to Dailey's ability to demonstrate that the twenty-pound lifting restriction affects the major life activity of working. In addressing a question of whether an impairment substantially impairs the activity of working, the Fifth Circuit has held that:

> [S]ubstantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 (5th Cir. 1995). The Court has reviewed all of the admissible documentation and the affidavit of Ollie Dailey submitted by the plaintiff in support of his response to the motion for summary judgment and finds that Dailey presents no evidence that his twenty-pound lifting restriction prevents him from performing an entire class of jobs or a broad range of jobs. Although the nonmovant may satisfy his burden by tendering depositions, affidavits and other

competent evidence,[6] "[m]ere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 82 (1992).

Mr. Dailey has returned to Vought and has been working since May 1995. Ollie Dailey Affidavit at ¶ 5; P.P. Montez Affidavit at ¶ 9. The Fifth Circuit has held that the inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to substantial limitation. *Dutcher* at 727. In Dailey's case, his lifting limitation prevents him from doing one aspect of the Class B machinist's job, lifting items over twenty pounds,[7] this is a single aspect of the job and does not show that he is unable to perform the work

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[6] *See* FED. R. CIV. P. 56(e).

[7] The Court, while addressing the ADA claim on its own merits, is not required to ignore completely Dailey's past history. His personal physician's previous lifting limitations have run the gamut from no work at all to an ability to lift as much as fifty pounds. The limitations which Dailey presented to his employer hit almost every five-pound increment in between those levels and sometimes more than once. To say his restrictions fluctuated is an understatement. While this information certainly puts his injury in perspective, for purposes of this motion, and only for the purposes of this motion, the Court will accept Dailey's own statement of his lifting limitation contained in his submitted affidavit. Accordingly, the Court addresses only the twenty-pound restriction in this motion. The Court cautions Mr. Dailey and his attorney that any future claim based upon the same injury, but with a "new," lower lifting restriction will be looked upon with disfavor and result in the almost certain proposition of sanctions.

generally.[8] "An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one." *Id.*

In its research, the Court has found several cases with facts which are similar to the action at hand. While no Fifth Circuit case has ruled directly on lifting limitations as a disability, the Court finds *Dutcher* and cases from other circuits persuasive. The circumstances present in one such case, *Lowe v. Angelo's Italian Foods*, 1994 WL 675027 (D. Kan. Nov. 18, 1994), relate closely to plaintiff's claimed impairment. Indeed the plaintiff in *Lowe* had

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[8] The Fifth Circuit has also held that three additional factors can be considered when determining whether an impairment substantially limits the major life activity of working. Those five are:

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (Class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Dutcher at 727 *citing* 29 C.F.R. 1630.2(j)(3)(ii)(A)-(C). Dailey provided no such evidence in opposing Vought's summary judgment motion.

even greater restrictions than Dailey alleges. In *Lowe*, the plaintiff had a lifting restriction of no greater than fifteen pounds and only on an occasional basis. The plaintiff also was restricted from doing much stooping or bending. Although these limitations precluded the plaintiff from performing her former position, the court found, as a matter of law, that these limitations did not substantially limit a major life activity. *Id.* at 4-5. Other cases in which lifting restrictions were at issue on motions for summary judgment include *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994) (an employee who stated that he could perform any job that did not require overhead lifting in excess of fifty to seventy pounds failed to establish that he was disabled within the meaning of the ADA), *cert. denied*, 115 S.Ct. 1104 (1995); *O'Dell v. Altec Industries, Inc.*, 1995 WL 611341 (W.D. Mo. Oct. 16, 1995) (permanent work restrictions of lifting 35 lbs. maximum with frequent lifting and/or carrying of objects weighing up to 20 lbs insufficient to establish plaintiff was disabled under the ADA); *Czopek v. General Electric Company*, 1995 WL 374036 (N.D. Ill. June 21, 1995) (twenty pound lifting restriction did not render an employee disabled for purposes of the ADA); *Hutchinson v. United Parcel Serv*, 883 F. Supp. 379 (N.D. Iowa 1995) (seventy pound lifting restriction insufficient); *Otis v. Canadian Valley-Reeves Meat Co.*, 884 F. Supp. 446 (W.D. Okla. 1994) (temporary lifting restriction of twenty-five pounds and permanent restriction of seventy pounds did not qualify plaintiff as a disabled person under the ADA), *aff'd*, 52 F.3d 338 (10th Cir. 1995); *Aucutt v. Six Flags over Mid-America*, 869 F. Supp. at 744 (E.D. Mo. 1994) twenty-five pound lifting restriction not disabling). The key in each of these decisions was the plaintiff's failure to

demonstrate an inability to perform a class of jobs or a broad range of jobs in various classes. *Bolt on v. Scrivner, Inc.*, 36 F.3d at 944; *Czopek v. General Electric Company*, 1995 WL 374036, at 2; *Otis v. Canadian Valley-Reeves Meat Co.*, 884 F. Supp. at 449; *Hutchinson v. United Parcel Serv*, 883 F. Supp. at 396; *Aucutt v. Six Flags over Mid-America*, 869 F. Supp. at 744.

Despite his conclusory statements that he is disabled, plaintiff has not shown that he is unable to engage in a class of jobs or in a broad range of jobs in various classes, nor has he established any limitations outside of the work setting. The Court concludes that Dailey failed to provide summary judgment evidence that his impairment substantially limits any major life activity.[9] Defendant Vought Aircraft is entitled to a summary judgment on Dailey's ADA claim on this basis alone. Additionally,

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[9] The ADA also provides an avenue for a plaintiff to complain that she had a record of such an impairment that substantially limits a major life activity. 42 U.S.C. 12102 (2)(B). There is also a claim under the ADA that a plaintiff was discriminated against on the basis that she had a "history of, or had been Misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2 (k). None of these claims are presented for determination in this case. Plaintiff is only complaining that he actually had a physical impairment that substantially impaired the major life activity of working. He is not complaining that Vought mistakenly regarded him as having such a disability or that he had a history of such a disability. These claims could have been brought in this lawsuit had Dailey included them in his petition. However, he did not and as such this memorandum opinion and order will preclude future claims based on those theories which rely upon the same facts as the ones now before this court.

Dailey offers no summary judgment evidence to controvert Vought's evidence that it was experiencing a paucity of work within Dailey's position which resulted in its refusal to allow him back to work, as well as causing the layoff of other B class machinists. *See* Affidavit of P.P. Montez. Accordingly, the Court finds that Vought took no action against Dailey based upon his impairment.

Conclusion

Based upon the above discussion, the Court finds that the defendant, Vought Aircraft Company, is entitled to summary judgment on Dailey's ADA claim. Accordingly, Dailey's claims are **DISMISSED with PREJUDICE.** The Clerk of the Court is **ORDERED** to close this case and to provide all parties with notice of its dismissal.

SO ORDERED.

March 8, 1996.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY,	*	
	*	
Plaintiff,	*	**CIVIL ACTION NO.**
VS.	*	**3:94-CV-1214-X**
	*	
VOUGHT AIRCRAFT COMPANY,	*	
	*	
	*	
Defendant.	*	
	*	

NOTICE OF APPEAL

(Filed March 18, 1996)

Notice is hereby given the Ollie Dailey, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment and Memorandum Opinion and Order entered on March 11, 1996.

Respectfully submitted,

Noemi A. Collie, Esq.
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Dallas, Texas 75208
(214) 942-6812
(214) 942-6818 (fax)
/s/ Noemi A. Collie
Noemi A. Collie, Esq.
State Bar No. 04589100

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was mailed via regular mail to opposing counsel, Maureen Moore, TRUE ROHDE & SEWELL, 8080 N. Central Expressway, 9th Floor, Dallas, Texas 75206 on March 18, 1996.

/s/ Noemi A. Collie
Noemi A. Collie, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY, Plaintiff, v. INT'L UNION, UNITED AEROSPACE WORKERS, LOCAL 848, Defendant.	§	CASE NO. 3:96-CV-1025-X
OLLIE DAILEY, Plaintiff, v. VOUGHT AIRCRAFT COMPANY, Defendant.	§	CASE NO. 3:94-CV-1214-X

ORDER

(Filed July 18, 1996)

In January of 1995, this Court entered sanctions against Ollie Dailey[1], plaintiff in this action, and his attorney, Noemi Collie. Those sanctions were stayed pending Dailey's appeal of his other actions[2]. The Court has been notified by the Fifth Circuit that both of those

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[1] *See Ollie Dailey v. Vought Aircraft Co.*, 3:94-CV-1214-X

[2] *See Ollie Dailey v. Vought Aircraft Co.*, 3:91-CV-1327-X and *Ollie Dailey v. Vought Aircraft Co.*, 3:94-CV-325-X

appeals have been resolved in the defendant's favor and the Court's opinion and judgment were affirmed in all respects.[3] On June 18, 1996, this Court ordered plaintiff and his counsel to pay the imposed sanctions within eleven (11) days of the date of that order. The date for payment of the sanctions was June 29, 1996. Since that date fell on a Saturday, plaintiff and his counsel had until Monday July 1, 1996 to pay the sanctions. As of the date of this Order, no payments has been received by the defendant for the attorney's fees that this Court entered as sanctions. Additionally, the Court has received no correspondence regarding the sanctions, no request for extension and no explanation for the willful failure to adhere to this Court's orders.

Consequently, this Court finds that it has no choice but to employ further measures in order to enforce the lawful orders of the Court. If parties and attorneys before this Court were allowed to wilfully ignore the orders of this Court, Rule 11 and the practices and procedures of the Court would be meaningless.

This Court initially granted a stay of the sanctions pending appeal. In his motion for a stay plaintiff initially represented that he had no funds to pay the sanctions. In anticipation of this same argument, the Court reminds the plaintiff that a lack of funds to pay a sanction is not in itself a reason to allow a litigant who is under sanction to file pleadings. *See Gelabert v. Lynaugh*, 894 F.2d 746, 748 (5th Cir. 1990). After careful consideration, the Court

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[3] *See Ollie Dailey v. Vought Aircraft Co.*, Dk. No. 95-10437; Judgment of the Fifth Circuit Court of Appeals Issued as Mandate on June 25, 1996.

finds that the conduct of the plaintiff and his wilful disregard of this Court's sanctions order necessitates that Plaintiff's case, 3:96-CV-1065-X (*"Dailey IV"*), must be **DISMISSED** for his failure to pay the court-imposed sanctions entered in his previous actions. The Court determines that this is the most lenient action that can be taken in order to prevent this conduct in the future on the part of this litigant or future litigants.

Accordingly, the Clerk of the Court is **ORDERED** to close this case and to provide all parties with notice of its dismissal. The Clerk of the Court is **FURTHER ORDERED** to place plaintiff's name on the sanctions list in the Northern District of Texas. Ollie Dailey may not file any pleadings or future actions without leave of this Court until the sanctions have been paid in full. If Dailey attempts to file any pleading or document in the Northern District, the Clerk of the Court is to return that document without filing it unless the Court provides instructions to the contrary.

The sanctions entered in *Dailey III* were entered against plaintiff and his attorney jointly and severally. Therefore, Noemi Collie is equally responsible for payment of the sanctions. As an attorney, Ms. Collie is held to a higher standard than her client and as such her blatant and wilful disregard of this Court's sanctions order is even more troublesome. After careful consideration, the Court determines that in order to enforce its lawful orders, it is necessary to bar Noemi Collie from practice in the Northern District until such time as the sanctions imposed in *Dailey III* have been paid in full. Consequently, Noemi Collie is **ORDERED** to provide a copy of this order to all of the district judges in the

Northern District of Texas. Noemi Collie is also **ORDERED** to provide a copy of this order to all parties whom she currently represents in the Northern District and to all opposing counsel on any cases currently pending in the Northern District. After Collie has delivered a copy of this order to all the above individuals, Collie shall mail to this Court a letter stating that she has complied with this order and provide the Court with a list of all served parties. Collie shall provide the above individuals with notice of this Order on or before **July 31st, 1996**. Within five days after Collie has served the above individuals, she shall forward the required letter to the Court.

Noemi Collie is **FURTHER ORDERED** to comply with Local Rule 13.2(c). The Clerk of the Court is **ORDERED** to return unfiled any motion, pleading, paper or document with the exception of a motion to withdraw or a motion to substitute counsel which Noemi Collie may attempt to file until further order of this Court. Upon payment of the sanctions and notification of such payment to the Court by defendant's cousel, Ms. Maureen Moore, Ms. Collie may resume practice in the Northern District.

SO ORDERED.

Dated: July 18, 1996.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY, Plaintiff, v. VOUGHT AIRCRAFT CO., Defendant.	§	CASE NO. 3:94-CV-1214-X
OLLIE DAILEY, Plaintiff, v. INT'L UNION, UNITED AEROSPACE WORKERS, LOCAL 848, Defendant.	§	CASE NO. 3:96-CV-1025-X

ORDER

(Filed Aug. 27, 1996)

Now before the Court is the Plaintiff's Motion for Reconsideration and/or Stay of June 18, 1996 and July 18, 1996 Orders and Brief in Support Thereof filed on July 29, 1996. After consideration of the motion and response, the Court determines that the motion should be, and is hereby, **DENIED**. With regard to Ollie Dailey's Motion for Reconsideration, the motion is **DENIED** in its entirety. With regard to Noemi Collie's Motion for Reconsideration, the Court **ORDERS** the following modifications to the July 18, 1996 Order:

The suspension pending full payment of the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X is modified to the extent that Ms. Collie may participate and file documents in the following cases which are currently set for trial:

1) 3:92-CV-1676	*Pogue v. City of Dallas*	Judge Urbom
2) 3:94-CV-2185-D	*Stephens v. DISD*	Judge Fitzwater
3) 3:95-CV-714-R	*Brookman v. Parkland Hosp.*	Chief Judge Buchmeyer
4) 3:95-CV-1919-H	*Mallery v. City of Dallas*	Judge Sanders
5) 3:95-CV-2747-G	*Mauldlin v. Fiesta Mart*	Judge Fish

In fairness to the litigants, for the convenience of the presiding judges of the Northern District of Texas, and to encourage the orderly resolution of these pending matters, Ms. Collie may continue to handle these cases until their resolution, subject to the approval of the presiding judge and subject to the application of her share of any funded settlement agreement or collected judgment in these cases to the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X.

The July 18, 1996 Order is only modified as to the above cases. The other provisions of that Order remain in full force and effect and Ms. Collie must comply with them without further delay. The Court is aware that Ms. Collie has not provided her clients, opposing counsel or the judges of the Northern District with copies of the July 18, 1996 Order. Ms. Collie will do so as soon as practicable upon receipt of this Order. Unless Ms. Collie is in

receipt of a written order staying this Court's July 18, 1996 Order, she must comply with the Order. As of this date, no such order has been entered. At this point in time, the Court will not impose further sanctions or hold a show cause hearing for contempt of court regarding the failure to follow the July 18, 1996 orders of this Court. However, if Ms. Collie has not provided this Court with documentation of her compliance with the notice provision of the July 18, 1996 Order by **3 p.m. on Monday, September 9, 1996**, the Court will take further action. Ms. Collie shall attach a copy of this Order along with the July 18, 1996 Order.

Ms. Collie and/or Ollie Dailey must pay the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X. Noemi Collie will not be permitted to appear in any other case other than the five cases listed above and she will not be allowed to file any new cases in the Northern District until those sanctions are paid. Ollie Dailey will not be allowed to file any other cases in the Northern District of Texas until the sanctions are paid.

SO ORDERED

Dated: August 27th, 1996.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY, Plaintiff, v. VOUGHT AIRCRAFT CO., Defendant.	§ § § § § § §	CASE NO. 3:94-CV-1214-X
OLLIE DAILEY, Plaintiff, v. INT'L UNION, UNITED AEROSPACE WORKERS, LOCAL 848, Defendant.	§ § § § § § § § §	CASE NO. 3:96-CV-1025-X

ORDER AMENDING ORDER
ON MOTION FOR RECONSIDERATION

(Filed Sept. 9, 1996)

On August 27, 1996, the Court entered an order amending its original order of sanctions issued on July 18, 1996. In that Order, the Court listed five cases which were currently set for trial which Ms. Collie would be allowed to participate in despite her suspension pending payment of monetary sanctions. The Court has discovered that a case pending before Judge Sanders was inadvertently left off the list. Consequently, that Order is

amended to allow Ms. Collie to participate in the following case, 3:96-CV-1372-H, *Mary F. Adegoke v. Ogden Aviation Service Company of Texas, Inc.*

The conditions which applied to the August 27, 1996 Order apply equally to the case listed above. In fairness to the litigants, for the convenience of the presiding judges of the Northern District of Texas, and to encourage the orderly resolution of that matter, Ms. Collie may continue to handle the case until its resolution, subject to the approval of the presiding judge and subject to the application of her share of any funded settlement agreement or collected judgment to the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X.

Ms. Collie and/or Ollie Dailey must pay the sanctions imposed in *Ollie Dailey v. Vought Aircraft, Co.*, 3:94-CV-1214-X. Noemi Collie will not be permitted to appear in any other case other than the cases previously listed by the Court and she will not be allowed to file any new cases in the Northern District until those sanctions are paid.

SO ORDERED

Dated: September 9, 1996.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OLLIE DAILEY, Plaintiff, V. INT'L UNION, UNITED AEROSPACE WORKERS, LOCAL 848, AND LTV AEROSPACE AND DEFENSE COMPANY Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 3:96-CV-1025-X
OLLIE DAILEY, Plaintiff, V. VOUGHT AIRCRAFT CO., Defendant.	§ § § § § § §	CIVIL ACTION NO. 3:94-CV-1214-X

NOTIFICATION OF PAYMENT OF SANCTIONS

NOW INTO COURT comes Maureen F. Moore, Defendant's counsel in the above entitled matters, and pursuant to this Court's July 18, 1996 Order, states as follows:

1. On September 23, 1996, Ms. Noemi Collie sent to me a check payable to Vought Aircraft Company (hereinafter "Vought") in the amount of $8,400.00 and a money order in the amount of $80.00 in payment of the sanctions

entered against Ms. Collie and her client Ollie Dailey on January 6, 1995.

2. Ms. Collie informed my office the afternoon of October 3, 1996 that the check had cleared on September 27, 1996.

3. Despite making calls to its bank, Vought has not received confirmation that the check has cleared. However, this afternoon Ms. Collie gave me permission to contact Schwab One, on which the check was drawn, and allowed them to release to me the fact that the check did clear on September 27.

Respectfully submitted,

/s/ _____

Maureen F. Moore
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COUNSEL FOR DEFENDANT
VOUGHT AIRCRAFT COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notification of Payment of Sanctions has been served via fax and via United States mail, certified, return receipt requested, on counsel for Appellant, Noemi A. Collie, 434 W. 12th Street, Dallas, Texas 75208, this 4th day of October, 1996.

/s/ _____
Maureen F. Moore